DEPARTMENT OF STATE A/ODC/MR
REVIEW June 3, 1953 3/19/82

TO : The Secretary

THROUGH: S/S

FROM : Mr. Phleger

SUBJECT: Transmission to Senate of Treaty of Friendship, Commerce and Navigation signed with Japan April 2, 1953; provisions on practice of law

DISCUSSION:

Senator Hickenlooper, chairman of the subcommittee of the Senate Foreign Relations Committee appointed to study the treaties of friendship, commerce, and navigation (FCN) pending in the Senate, has been in general opposition to treaty provisions which remove the requirement of citizenship for the practice of professions. This opposition is directed primarily at the practice of law and is apparently based upon strong objections by influential members of the American Bar Association to the treaty provisions which remove the requirement of citizenship for the practice of law.

Article VIII, paragraph 2, of the treaty with Japan, which is broad in its terms and contains no exception respecting the practice of law, provides as follows:

> "Nationals of either Party shall not be barred from practicing the professions within the territories of the other Party merely by reason of their alienage; but they shall be permitted to engage in professional activities therein upon compliance with the requirements regarding qualifications, residence and competence that are applicable to nationals of such other Party."

Questions Raised

In view of objections which have been raised, there exists a question as to whether the Department should (a) submit the Japanese treaty to the Senate in its present form, risking the probability of a Senate reservation excepting the practice of law or even the possibility of a Senate reservation excepting all professions, or (b) negotiate an exchange of notes, or sign the treaty anew, to exclude the practice of law before the treaty is submitted to the Senate.

Our Congressional

Our Congressional Relations staff has been informed by a member of the Senate Foreign Relations Committee staff that unless the treaty with Japan is submitted to the Senate by the end of next week it will not be considered by the Senate before it adjourns or recesses.

In submitting the treaty to the Senate in its present form the Department would be regarded as actively supporting provisions on which there is some opposition in the Senate and would lay itself open to further criticism by ABA members.

Ordinarily, the mere anticipation of some opposition to certain treaty provisions would not restrain the Department from seeking Senate approval of such provisions if they were deemed to be in the best interests of Americans abroad and an appropriate subject for a treaty. More than once the Senate has approved treaty provisions in spite of some opposition.

However, the atmosphere in which the pending FCN treaties are being considered is not ordinary. The expected further criticism by ABA members, coupled with criticism leveled at the Department by proponents of the Bricker Resolution, would have considerable public appeal in some quarters.

Justifying the inclusion or retention in treaties of broad provisions which remove the requirement of citizenship for the practice of professions without a specific exception respecting law is made difficult by the fact that in the United States lawyers are officers of the court and must take an oath to support and defend the Constitution.

Furthermore, there is the possibility that, in the consideration of the treaty, remarks may be made in the Senate and in the press which might be so embarrassing to the Japanese as to disturb the friendly relations engendered by the signature of the treaty and possibly delay, if not thwart, Japanese ratification or result in a request by the Japanese for withdrawal of some of the important concessions they made in negotiating the treaty.

You may wish to have this matter made the subject of consultation with Senate leaders before reaching a final decision as to the procedure to be followed.

A review of the historical background of treaty provisions regarding national treatment for professions is attached as of possible interest.

Why Included in Treaty with Japan

Notwithstanding objections which had been voiced by certain ABA members and by Senator Hickenlooper regarding the professions clause in pending FCN treaties, the clause was included in the

treaty

treaty with Japan in the form above-quoted for the following reasons:

1. No report on the treaties involved had been made and the views of other Senators were not known.

2. In the negotiation of the treaty the Japanese were very reciprocity-and-equality minded, requesting rights accorded other countries in recent friendship, commerce, and navigation treaties. It was apparent that the Japanese considered equality of treatment as vital to successful negotiation.

3. Ambassador Murphy and the U.S. Chamber of Commerce in Tokyo urged retention of the professions clause, there being several hundred Americans engaged in professional work in Japan, 30 of whom were practicing law (only one of whom had been licensed to appear in the courts).

4. Several of the other provisions of the treaty (such as those on banking) were rather difficult for the Japanese to accept. It was feared that withdrawal of the professions clause would stiffen their resistance to these provisions and result in a treaty on the whole less satisfactory to U.S. interests. The Japanese reluctantly agreed, inter alia, to provisions protecting American banks in Japan, even though they have no banks in the U.S.

5. In the future, as American investments increase in foreign countries, the need for the services of American professionals there will increase. At least one professional organization, the American Institute of Accountants, has voted its support of the provision. It is only as to application of the provisions to the law profession that there has been any public opposition.

6. It was not known how broad a reservation the Senate might finally desire, if any.

7. It was not felt that the Department should, in the circumstances, assume the responsibility of withdrawing the professions clause from the Japanese treaty but that the proper forum for a final decision was the Senate, acting in fulfillment of its constitutional function in the treaty process.

A recent telegram from the American Embassy at Tokyo reports that the treaty with Japan was submitted to the Diet on May 27 and a month or two may go by before it is acted upon by both the lower and upper houses.

Transmitting the treaty with Japan to the Senate in its present form may help relieve the Israel treaty from bearing all the

criticism

criticism on the professions article, especially on the practice of law. On the other hand, unless the Department takes the initiative in meeting the objections raised, it may have to face not only considerable undesirable criticism but also a sweeping reservation, applying to all professions for which citizenship may be required by State laws.

RECOMMENDATIONS:

It is my recommendation that:

(1) An effort be made to negotiate an exchange of notes with the Japanese to exclude the practice of law from the professions article.

(2) A similar negotiation be undertaken with Israel if the negotiations with Japan are successful.

(3) These recommendations be discussed with Senate leaders to ascertain their views on this approach to the problem before any approach is made to the Japanese and Israel Governments.